

(2010) 11 OHC CK 0047

In the Orissa High Court

Case No : Writ Petition (C) No. 11729 of 2008

Patitapaban Mohapatra

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 09-11-2010

Acts Referred:

Orissa Education (Establishment, Recognition and Management of Private Junior Colleges/Higher Secondary Schools) Rules, 1991 — Rule 21, 23(2)(3), 25(3)

Citation : (2011) 112 CLT 98 : (2011) 1 OLR 902 : (2011) 112 PLJR 98

Hon'ble Judges : M.M. Das, J

Bench : Single Bench

Final Decision : Allowed

Judgement

M.M. Das, J.—The approval of the Governing Body of Debendra Satpathy Memorial College, Gyanavihar, Dhenkanal on 26.4.2008 by the Regional Director of Education, who is the prescribed authority, which has been annexed to the Writ Petition as Annexure-10, is under challenge in the present Writ Petition. The above named college is a private unaided recognized one. The +2 Branch of the said college was established in the year 1991. It is claimed by the Petitioner that the educational agency, which is the Governing Body of the college, of which the Petitioner was the Secretary of the committee of management, made necessary application for registration of the committee under the Societies - Registration Act, 1860 & the said society was registered on 27.11.1991. On making proper application for permission to establish +2 as well as +3 streams, the prescribed authority granted permission in respect of +2 wing vide notification dated 24.9.1994 from the academic session 1993-94. Thereafter, temporary recognition in respect of +2 wing was granted from 1994-95 which was extended from time to time & finally permanent recognition was granted from the academic session 2003-04. The Council of Higher Secondary Education accorded affiliation in respect of the +2 wing of the college on 17.11.1994. The Governing Body was constituted to manage the day to day affairs of the college in respect of the +2 Arts stream in the year 1991 & was approved by the competent

authority by an office order for a period of three years in which the Petitioner was the Secretary. Prior to expiry of the term of the Governing Body, the outgoing Governing Body passed a resolution nominating one Prasanna Kumar Sahoo as the President & the Petitioner as the Secretary of the Governing Body for the second time which was duly reconstituted & approved by the prescribed authority on 15.3.1999. Again before expiry of the period of the said Governing Body, upon a resolution, it was reconstituted in conformity with the amendment in Orissa Education (Establishment, Recognition & Management of Private Junior Colleges/Higher Secondary Schools) Rules, 1991 (for short, "the Rules, 1991"). The present Petitioner was nominated as a member of the reconstituted Governing Body & was also elected as the President of the said Governing Body which was approved by the Regional Director on 4.1.2002. The Petitioner claims to have donated more than Rs. 1.00 lakh to the college & was taken as the Member in the category of donor. It has been alleged that the Opp. Party No. 12 after being elected as Member of Parliament from Dhenkanal Constituency, due to hostile attitude towards the Petitioner on account of political alignment, pressurized the authorities for which, without following any procedure, a decision was taken to dissolve the Governing Body of the college & an order was passed superseding the Governing Body on 18.6.2004. In the very same letter, the Sub-Collector, Sadar, Dhenkanal was appointed as the Special Officer to manage the affairs of the college. Taking advantage of the situation, the Opp. Party No. 12 managed to submit a proposal through the Sub-Collector vide his letter dated 24.12.2004 before the Opp. Party No. 3 the Regional Director of Education for reconstitution of the Governing Body. The Petitioner contended that the proposal purported to have been submitted by the Sub-Collector in the capacity of Special Officer is not in conformity with the Rule, which provides detail procedure, as to how a proposal is to be submitted & therefore, the so-called proposal was without authority of law. However, the proposal got approval from the Director, who approved the same arbitrarily, without due application of mind & ignoring the provisions under Rules 23 & 25 of the Rules, 1991. The reconstitution of the said Governing Body on 19.3.2005 has been challenged by the Petitioner in W.P. (C) No. 5292 of 2006 before this Court which is stated to be subjudice. It is further alleged that the Opp. Party No. 3 in response to the notice issued by this Court in the aforesaid Writ Petition clearly admitted that the Petitioner is the only donor member of the college. At this juncture, a proposal was submitted by the so-called Governing Body, constitution of which is the subject-matter of challenge in W.P.(C) No. 5292 of 2006 at the instance of Opp. Party No. 12. Having come to know about such action, the Petitioner sought for information under the R.T.I. Act & learnt that the Opp. Party No. 3 without proper scrutiny of the documents & without making any enquiry whatsoever approved the Governing Body in his letter dated 26.4.2008 which is impugned in the present Writ Petition. The said approval of the Governing Body under Annexure-10 has been challenged by the Petitioner on various grounds as mentioned in paragraph-24 of the Writ Petition.

2. Separate counter affidavits have been filed by the Opp. Party No. 3 as well as

Opp. Party Nos. 6, 12 & 13 respectively. In both the counter affidavits, the locus standi of the Petitioner has been questioned & the allegations made by the Petitioner have been denied. The Opp. Party No. 3 has stated that it is a fact that the Sub-Collector, Sadar, Dhenkanal-cum-Special Officer submitted a proposal vide his letter dated 24.12.2004 before the prescribed authority to reconstitute the Governing Body & the prescribed authority with proper verification, application of mind & in consonance with the Rules, 1991, as amended in 2001, approved the Governing Body by his Order Dated 19.3.2005. The Opp. Parties 6, 12 & 13, while denying the allegations made in the Writ Petition & challenging the locus standi of the Petitioner, have supported the approval of the Governing Body, inter alia, stating that the earlier approval dated 19.3.2005 of the reconstitution of the Governing Body as per the proposal submitted by the Sub-Collector which was made on 19.3.2005 has not been challenged by the Petitioner & without challenging the said order of reconstitution dated 19.3.2005, the subsequent order of approval dated 26.4.2008 cannot be questioned by the Petitioner.

3. This Court on analyzing the facts of the case finds that instead of entering into various factual disputes raised by the parties & instead of addressing itself to the several grounds of attack to the approval of the Governing Body at Annexure-10, the only relevant question which can determine the issue is as to whether the said Governing Body, which has been approved under Annexure-10 is in conformity with the Rules & as to whether in view of the decision in the case of Kishori Mohan Mohapatra and Others Vs. State of Orissa and Others, , the Governing Body as approved under Annexure-10 can be sustained or not.

4. Mr. Routray, Learned senior Counsel appearing for the Petitioner vehemently urged that in the case of Kishori Mohan Mohapatra and Ors. (supra), this Court has clearly laid down as follows:

Rule 25, inter alia, provides that the Governing Body of a college shall be so reconstituted as to include amongst others one nominee each of the Vice Chancellor of the University, the Director & the Member of Parliament representing the Parliamentary Constituency in which the college IS situated. In this case, what appears to have happened is that no nomination was made by the Member of Parliament & also by the Vice Chancellor. Therefore, in the Order Dated 12.5.1992 (Annexure-5), what is stated is

N.P. Bhadrak"s nominee" & "Utkal University V.C"s nominee". Thus, without knowing who will be the persons nominated by the M.P. & the Vice-Chancellor of the University, the Director granted the approval. The power which is conferred upon the Director under Sub-rule (3) of Rule 25 is to be exercised in a judicious manner &, therefore, it becomes the duty of the Director to see that proper persons constitute the Governing Body of the College. The act of approval is not to be performed mechanically but with the sense of responsibility & with proper application of mind. It Is difficult to appreciate how, without knowing who will be constituting the Governing Body, the Director, could have granted his approval. If

the approval is permitted to be granted in the manner in which the Director has done, then the very purpose of giving approval would be lost. The Director, as it appears from the further provision made in Sub-rule (3) of Rule 25, has a right to object to a particular person being included in the list or to make a suggestion in that behalf. That also indicates that the Director has to consider suitability of each person who is going to constitute the Governing Body. As the Director in this case has granted approval without considering the relevant aspects, it has to be held that the approval was granted without proper application of mind. We, therefore, quash & set aside the Order Dated 12.5.1992 (Annexure-5)

Mr. Routray further submitted that the said ratio has been repeatedly followed by this Court in various subsequent Judgments & has referred to Order Dated 17.12.2008 passed in W.P.(C) No. 18638 of 2008, where this Court relying upon the said decision in the case of Kishori Mohan Mohapatra and Ors. (supra) quashed the approval of the Governing Body made in the said case.

5. Mr. Acharya, Learned Counsel appearing for the Opp. Parties 6 & 12, on the contrary, contended that the Petitioner has not filed a scrap of paper in support of his plea that he should be taken as a member of the Governing Body as a donor. He further contended that the college was established by Debendra Satpathy Memorial Trust, which is a society registered under the Societies Registration Act, 1860 & it is an educational agency. The bye-law of the said society clearly shows that the society was formed to establish a college, namely, Debendra Satpathy Memorial College. Referring to the amended rules of the Rules, 1991, he submitted that the impugned approval of the Governing Body has been done in accordance with the amended rules. With regard to non-mentioning of the names of the nominees of the V.C., Director, M.L.A. and/or M.P., Mr. Acharya contended that even in the absence of such members, the reconstitution of the Governing Body would not be invalidated as Rules 21 & 23 of the Rules, 1991 are directory in nature. The provision in the Rules that a Governing Body shall consist of 15 members is not mandatory inasmuch as the Rules itself provide for continuance of a vacancy in the event of non-availability of a member under a particular category & mere use of expression "shall" does not make a provision mandatory. With regard to applicability of the decision in the case of Kishori Mohan Mohapatra and Ors. (supra), he submitted that the ratio of the said decision is inapplicable to the facts of the present case & the said judgment was rendered on the basis of the un-amended provisions of the Rules which have undergone a drastic amendment in the year 2001. According to him, in the said case, this Court was considering the reconstitution of the Governing Body of an aided college on the basis of the un-amended rules. But in the instant case, the college is a private college & is not receiving any aid from the Government, but is being managed by the Trust out of its own resources.

6. In reply, Mr. Routray submitted that from Annexure-6, it is clear that the Petitioner is the only donor. There is no bar under law to include a person as a member of the Governing Body even though the previous Governing Body was

superseded, where he was a member. He further contended that the Opp. Party No. 3 has accepted in his counter affidavit that the name of Shri Tathagata Satpathy - Opp. Party No. 12 finds place twice in the impugned Annexure-10 as the local M.P. as well as a member (donor) interested in the field of education). That ipso facto clearly reveals that the prescribed authority was not sure whether the Opp. Party No. 12 was taken as a member, because he is a donor or because he is interested in the field of education, which clearly discloses non-application of mind while approving the Governing Body. As an instance, Mr. Routray stated that if the contention of Opp. Party No. 3 that a person can be taken as M.P. & also as the donor/person interested in the field of education, then the very provision of the rules confining the total number of members to be 15 will be frustrated & if such an interpretation is made, then one person, who is a M.P. as well as a donor, he can be taken as the donor member as well as the M.P. & if he belongs to Scheduled Caste category can also be taken as a member as such & if she is a woman, can also be taken as member as woman member & also a person interested in the field of education. He relies upon the decision in the case of Ramchandra Keshav Adke (Dead) by Lrs. and Others Vs. Govind Joti Chavare and Others, in support of his contention that when the Rules provide for a particular manner in which a thing has to be done, it has to be done in the same manner or not at all.

7. As has already been stated above, this dispute can be decided only on examining as to whether the impugned approval of the Governing Body as at Annexure-10 is in accordance with the prescribed rules or not. With regard to the fact as to whether the Petitioner has a locus standi to file the present Writ Petition, it is seen from Annexure-6 that the Petitioner was taken in the said Governing Body approved on 15.3.1999 as Secretary being the donor. Therefore, this Court is of the view that the Petitioner has locus standi to file the present Writ Petition.

8. In the case of Kishori Mohan Mohapatra and Ors. (supra), this Court interpreting Rule 25 of the Rules, 1991 finding that the names of the nominees of M.P. Bhadrak & V.C. of Utkal University were not there in the approval order of the Governing Body came to the conclusion that the power conferred upon the Director under Sub-rule (3) of Rule 25 is to be exercised in a judicious manner & therefore, it becomes the duty of the Director to see that proper persons constitute the Governing Body of the college. The act of approval is not to be performed mechanically but with the sense of responsibility & with proper application of mind. This Court expresses its anguish by observing that it is difficult to appreciate howl without knowing who will be constituting the Governing Body, the Director could have granted his approval & if the approval is permitted to be granted in the manner in which it has been done, then the very purpose of giving approval would be lost. It was further observed by this Court that the Director from the further provision made in Sub-rule (3) of Rule 25 has a right to object to a particular person being included in the list or to make a suggestion in that behalf which indicates that the Director has to consider

suitability of each person who is going to constitute the Governing Body. Finding that the Director has not done so, this Court quashed the order of approval of the Governing Body in the said case. In the case of Kishori Mohan Mohapatra and Ors. (supra), this Court was considering Rule 25 of the Orissa Education (Establishment, Recognition & Management of Private Junior Colleges/Higher Secondary Schools) Rules, 1991, which deals with constitution of the Governing Body of the college as soon as the same becomes an aided college. However, the said Rule also provides that the V.C. of the Utkal University, the Director & the M.P. representing the Parliamentary Constituency in which the college is situated shall nominate one member each who shall hold office during their pleasure. In Rule 23, sub-rules (2) & (3) as amended in 2001, it is also provided that local M.L.A. or his/ her nominee, the local M.P. or his/her nominee, one person to be nominated by the V.C. of the University having jurisdiction over the institution or by the Chairman, Council of Higher Secondary Education, as the case may be, who shall be a woman, shall be members of the Governing Body. It also provides that the Governing Body shall consist of 15 members as prescribed therein. Therefore, Rule 25 of the Orissa Education (Establishment, Recognition & Management of Private Colleges) Rules, 1991 & sub-rules (2) & (3) of the Rules, 23 as amended in 2001 with regard to membership of the local M.L.A., M.P. & nominees of the V.C. or the Chairman, C.H.S.E. are *pari materia*.

(emphasis supplied)

9. In the present case, the Governing Body which has been approved under Annexure-10 & has been challenged in this Writ Petition also does not bear the name of a nominee of the Chairman, C.H.S.E. & nominee of the Director, Higher Education. Further, the Opp. Party No. 12, who is the local M.P. could not have been taken twice as member of the Governing Body being the local M.P. as well as a member, being the donor/interested in the field of education. The Regional Director also appears to have not applied his mind as to whether the Opp. Party No. 12 has been taken as a member being a donor or a person interested in the field of education.

10. This Court, therefore, is of the considered view that the ratio as laid down in the case of Kishori Mohan Mohapatra and Ors. (supra) is squarely applicable to the facts of the present case & the approval of the Governing Body as at Annexure-10 is unsustainable. The said Annexure-10 is, therefore, quashed & the matter is remitted back to the Opp. Party No. 3 to reconstitute the Governing Body of the Debendra Satpathy Memorial College strictly in accordance with the Rules governing the field upon due application of mind keeping in view the decision in the case of Kishori Mohan Mohapatra and Ors. (supra).

11. In the result, the Writ Petition is allowed, but in the circumstances without cost.